

A **Asahi Kosei (M) Sdn Bhd v Petronas Dagangan Bhd**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
B-02(IM)-1422-06 OF 2012

B MOHD HISHAMUDIN, LIM YEE LAN JJCA AND HAMID SULTAN J
25 JANUARY 2013

C *Tort — Negligence — Fire — Purchase of liquefied petroleum gas — Cost lives of employee and driver — Whether independent contractor liable for negligence — Exceptions or apparent exceptions to general rule that employer not liable for tort committed by independent contractor — Whether employer can be held vicariously liable for negligence committed by independent contractor in execution of duties*

D The present appeal pertained the appellant's ('the plaintiff') appeal against the
E decision of the High Court which allowed the respondent's ('the first
F defendant') application under O 18 r 19(1)(a) or (b) and/or (d) of the Rules of
the High Court 1980 or under the inherent jurisdiction of the court. The facts
G were that the appellant ('the plaintiff') had agreed to purchase liquefied
petroleum gas from the respondent ('the first defendant') and the terms in the
H sale and purchase agreement contained obligations for safe delivery with a right
to assign by either party with a strict term. The first defendant then appointed
the second defendant to distribute the petroleum. Unfortunately, a fire broke
out at the plaintiff's premises when the second defendant's tanker was
unloading the petroleum, which cost the lives of the tanker driver and one of
the plaintiff's employees. Hence, the plaintiff filed an action against the
defendants. The first defendant contended that the second defendant was an
independent contractor and therefore not liable for negligence of the
independent contractor. The plaintiff argued that there were two exceptions or
apparent exceptions to the general rule that an employer is not liable for tort
committed by his independent contractor. The plaintiff's contention in the
present appeal was that it was plainly wrong for the learned judge to strike out
the plaintiff's claim based on the respondent's contention that an employer
cannot be held vicariously liable for negligence committed by an independent
contractor in the execution of the latter's duties without considering the
exceptions to the general rule.

Held, allowing the appeal with costs:

I (1) It is trite that the general principles relating to liability on an action
against third parties in negligence and contracting parties may vary. The
contractual terms itself may extend or limit the scope of duty of care
which the court must give effect to in deciding liability and, if applicable,
also quantum (see para 9(a)); *Lealoris (M) Sdn Bhd v Bumiputra*

Commerce Bank Bhd [2013] 7 MLJ 25 referred and *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 referred.

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- (2) At times, the contractual provision will impose a direct legal duty to the relevant parties which may not be delegated. It all depends on the facts. It is for the trial court to determine whether the first defendant in this particular case owed the legal duty complained of to the plaintiff. In the instant case, it must not be forgotten there were contractual terms between the appellant and respondent and also between the respondent and the second defendant which may be an important factor to decide on the issue of liability (see para 9(b)); *Lealoris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd* [2013] 7 MLJ 25 referred.

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[Bahasa Malaysia summary]

Rayuan ini adalah berkaitan rayuan perayu ('plaintiff') terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan responden ('defendan pertama') di bawah A 18 k 19(1)(a) atau (b) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 atau di bawah bidang kuasa sedia ada mahkamah. Fakta kes adalah perayu ('plaintiff') telah bersetuju untuk membeli cecair gas petroleum daripada responden ('defendan pertama') dan terma-terma dalam perjanjian jual beli mengandungi tanggungjawab untuk penghantaran selamat dengan hak untuk menyerahkan oleh mana-mana pihak dengan terma ketat. Defendan pertama kemudian melantik defendan kedua untuk mengagihkan petroleum itu. Namun begitu, kebakaran berlaku di premis plaintiff apabila lori tangki defendan kedua sedang memindahkan petroleum itu, yang meragut nyawa pemandu lori tangki minyak dan salah seorang daripada pekerja plaintiff. Justeru, plaintiff memfailkan tindakan terhadap defendan-defendan. Defendan pertama berhujah bahawa defendan kedua adalah kontraktor bebas dan oleh itu tidak bertanggungjawab untuk kecuaiannya kontraktor bebas itu. Plaintiff berhujah bahawa terdapat dua pengecualian atau pengecualian jelas kepada rukun am bahawa majikan tidak bertanggungjawab untuk tort yang dilakukan oleh kontraktor bebasnya. Hujahan plaintiff dalam rayuan ini adalah bahawa hakim bijaksana jelas salah kerana membatalkan tuntutan plaintiff berdasarkan hujah responden bahawa majikan tidak boleh diputuskan bertanggungjawab secara vikarius untuk kecuaiannya yang dilakukan oleh kontraktor bebas dalam pelaksanaan kewajipan kontraktor tersebut tanpa mengambil kira pengecualian kepada rukun am.

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Diputuskan, membenarkan rayuan dengan kos:

- (1) Adalah nyata bahawa prinsip am berkaitan liabiliti ke atas tindakan terhadap pihak ketiga dalam kecuaiannya dan pihak-pihak yang memasuki kontrak mungkin berbeza. Terma-terma kontrak itu sendiri boleh melanjutkan atau menghadkan skop kewajipan berjaga-jaga yang mahkamah perlu memberi keputusan dalam memutuskan liabiliti dan, jika terpakai, juga berhubung kuantum (lihat perenggan 9(a)); *Lealoris*

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- A (M) Sdn Bhd v Bumiputra Commerce Bank Bhd [2013] 7 MLJ 25 dirujuk dan *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 dirujuk.
- (2) Ada ketika, peruntukan kontrak akan mengenakan kewajiban undang-undang secara langsung terhadap pihak-pihak relevan yang mungkin tidak diberi tugas dan kuasa. Ia semuanya bergantung ke atas fakta. Adalah untuk mahkamah perbicaraan menentukan sama ada defendan pertama dalam kes tertentu ini mempunyai kewajiban sah yang diadukan kepada plaintif. Dalam kes ini, ia tidak boleh dilupakan yang mana terdapat terma-terma kontrak antara perayu dan responden dan juga antara responden dan defendan kedua yang mungkin merupakan faktor penting untuk memutuskan isu berhubung liabiliti (lihat perenggan 9(b)); *Lealoris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd* [2013] 7 MLJ 25 dirujuk.]
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Notes

- D For cases on fire, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1258–1271.

Cases referred to

- E *Burnie Port Authority v General Jones Pty Limited* [1994] 4 CLJ 1, HC (refd)
Century Insurance Co Ltd v Northern Ireland Road Transport Board [1942] 1 All ER 491, HL (refd)
Lealoris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd [2013] 7 MLJ 25, HC (refd)
- F *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, HL (refd)
Rowe v Herman [1997] 58 ConLR 38, CA (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)

Legislation referred to

- G Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)

Appeal from: Suit No 22NCVC-987 of 2011 (High Court, Shah Alam)

- H *Tan Tai Hwa (Tai Hwa & Co) for the appellant.*
Muhammad Faisal bin Moideen (Maximilian Tai Kim Sen with him) (Moideen & Max) for the respondent.

Hamid Sultan J (delivering judgment of the court):

- I [1] This is our judgment in respect of the appellant/plaintiff's appeal against the decision of the learned High Court judge who allowed the respondent/first defendant's application under O 18 r 19(1)(a) or (b) and/or (d) or under the inherent jurisdiction of the court. We heard the appeal on 3 December 2012

and we allowed the appeal with costs. My learned brother, Mohd Hishamudin Yunus JCA and my learned sister, Lim Yee Lan JCA have read the judgment and approved the same.

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[2] The central contention of the appellant is that it was plainly wrong for the learned judge to strike out the plaintiff's claim based on the respondent's contention that an employer cannot be held vicariously liable for negligence committed by an independent contractor in the execution of the latter's duties without considering the exceptions to the general rule which is applicable in the instant case.

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BRIEF FACTS

[3] By a sale and purchase agreement the appellant agreed to purchase liquefied petroleum gas from the respondent. There are several terms in the sale and purchase agreement imposing obligations for safe delivery with a right to assign by either party with a strict term stating that:

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that nothing herein shall relieve the assigning party of its duties and liabilities in the event of any breach of contract on the part of such assignee company.

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[4] Subsequently the respondent had by an agreement appointed the second defendant to distribute the petroleum. On or about 5 September 2005 a fire broke out at the appellant's premises when the second defendant's tanker was unloading the petroleum. The tanker driver as well as one of the employees of the appellant died in consequence of the fire and hence the plaintiff's action against the defendants.

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[5] It is the contention of the respondent that the second defendant is an independent contractor and in consequence is not liable for negligence of the independent contractor, in reliance of the Federal Court's decision of *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1 where it was held:

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... an employer is not responsible for the torts committed by an independent contractor in the course of the execution of the works.

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[6] The respondent also relies on the English Court of Appeal's decision in *Rowe v Herman* [1997] 58 ConLR 38 where the first defendant's application to strike out on the grounds that the first defendant was not liable for the negligence of the independent contractor was allowed.

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[7] The respondent further relies on the House of Lords' decision in *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] 1 All ER 491

A where liability of road tanker drivers and transportation company that employs them was considered. On the facts the court found liability on the independent contractor and held that the negligence was attributed to the lorry driver.

B [8] It is the contention of the appellant that there are two exceptions or apparent exceptions to the general rule that an employer is not liable for tort committed by his independent contractor. And relies on the Australian High Court judgment of Brennan J in the case of *Burnie Port Authority v General Jones Pty Limited* [1994] 4 CLJ 1 where it was stated:

C There are two exceptions, or apparent exceptions, to the general rule that an employer is not liable for a tort committed by his independent contractor: the first, when the employer directly authorises 'the doing of the act which amounts to a tort'; the second, when the employer engages the independent contractor to perform a duty resting on the employer and the independent contractor fails to perform it.

D Where the employer is sought to be made liable for the negligent conduct of an independent contractor but that conduct has not been authorised by the employer and is not breach of a duty of care resting personally on the employer, the negligence is said to be 'collateral' (Lord Blackburn used the term in *Dalton v Angus* (1881) 6 App Cas 740 at p 829, it had been used by Pollock CB in *Hole v Sittingbourne and Sheerness Railway Co* (1861) 6 H & N 488 at p 497 (158 ER 201 at 204)) and creates no liability in the employer.

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F In some cases where an employer is held liable for the tort of an independent contractor, the ground of liability can be seen clearly to be either authorisation of a negligent act (as in *Black v Christchurch Finance Co* [1894] AC at p 54; *McInnes v Wardle*) or non-performance of an employer's personal duty (as in *The Commonwealth v Introvigne* (1982) 150 CLR 258 at pp 270–271, 274–275, 279–280) but the two grounds coalesce where the doing by an independent contractor of an act authorised by the employer gives rise to a duty resting on the employer personally.

G In such a case, the relevant principle is that stated by Mason J in *Stoneman v Lyons* (1975) 133 CLR 550 at p 574:

H Although the general rule is that a person is not liable for the negligence of his independent contractor, it is accepted that a person who owes a duty to a third party cannot avoid responsibility for discharging that duty by delegating performance of it to an independent contractor.

I [9] We have read the appeal record and submission of the parties in detail. Both learned counsel have filed a comprehensive submission on the law and facts. It will serve no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of the learned counsel for the respondent, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

- (a) it is trite that the general principles relating to liability on an action against third parties in negligence and contracting parties may vary. The contractual terms itself may extend or limit the scope of duty of care which the court must give effect to in deciding liability and, if applicable, also quantum (see *Lealoris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd* [2013] 7 MLJ 25; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555). A B
- (b) even in the case of *Century Insurance* which the respondent had relied on, the House of Lords went to consider the contractual terms of the relevant parties before deciding on the issue of liability in negligence. The case was not dealt purely on tortious principles alone. At times the contractual provision will impose a direct legal duty to the relevant parties which may not be delegated. It all depends on the facts. And it is for the trial court to determine whether the respondent in this particular case owes the legal duty complained of to the appellant. In the instant case, it must not be forgotten there are contractual terms between the appellant and respondent and also between the respondent and second defendant which may be an important factor to decide on the issue of liability (see *Lealoris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd* [2013] 7 MLJ 25). In this respect, the appellant's submission, inter alia, which states: C D E
- There are 2 classes of duties — (i) a duty to take reasonable care and (ii) a duty to see that care is taken. It may well be that in the former there is in general no liabilities for the breach of an independent contractor, but in the latter there is. In the latter duty, the law actually imposes a duty irrespective of negligence as the liability is strict or absolute. This is because where the act which the independent contractor employed to do is one of the kind which the employer does at his own peril, so that the existence of negligence is immaterial. It is no defence that the cause of the mischief was the negligence of an independent contractor by whose agency the act was done. Here, the Respondent is under a duty, he is liable is that duty is not performed by itself and damage thereby results. The Respondent cannot evade that liability by delegating the performance of that duty to the 2nd Defendant. F G
- [10] For reasons stated above, the appeal is allowed with costs. The judgment of the High Court is set aside and early date is to be fixed for case management in the High Court. The respondent to pay the appellant costs in the sum of RM5,000. H

A [11] We hereby order so.

Appeal allowed with costs.

B Reported by Afiq Mohamad Noor

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